Supreme Court, U.S.
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No. 87-95

In The

Supreme Court of the United States

October Term, 1987

WATER CONSERVATION SYSTEMS CO.,
GARY R. HAGEBUSH,
ROY E. SCHWASINGER,

Petitioner,

v.

FIRST NATIONAL BANK OF OMAHA,
NEBRASKA STATE BAR ASSOCIATION,
KAY ORR, GOVERNOR OF NEBRASKA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEBRASKA SUPREME COURT

BRIEF OF RESPONDENT KAY ORR IN OPPOSITION

KAY ORR, Governor,
State of Nebraska

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QUESTION PRESENTED

The sole question which could properly be raised from the record below is whether or not, as a matter of state law pleading and practice, the Supreme Court of Nebraska properly affirmed the lower court's dismissal.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEBRASKA SUPREME COURT

BRIEF OF RESPONDENT KAY ORR IN OPPOSITION

The respondent Kay Orr, Governor of Nebraska, respectfully requests that this court deny the Petition for Writ of Certiorari, seeking review of the dismissal of this case by the Supreme Court of Nebraska.

OPINION BELOW

The relevant opinion of the Supreme Court of Nebraska appears in the appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on June 17, 1987, affirming the Lancaster County District Court's dismissal of petitioners' motion for a writ of mandamus. The petitioners did not properly raise, and the Supreme Court of Nebraska did not enter judgment on, any federal question. The judgment of the Supreme Court of Nebraska was based solely on Nebraska law and presents no constitutional or federal question. Therefore, this court lacks jurisdiction to issue a writ of certiorari to the Nebraska Supreme Court.

———o———

STATUTES OR CONSTITUTIONAL PROVISIONS

The decision of the Supreme Court of Nebraska was based upon the law of the State of Nebraska. Therefore, no United States Constitutional provisions or federal statutes were involved in the decision.

———o———

STATEMENT OF THE CASE

Petitioners defaulted on two bank notes, one for $10,000 and one for $1,500, issued by the First National Bank of Omaha ("First National"). First National sued the petitioners, Gary R. Hagebush and Roy E. Schwasinger, to recover on the defaulted notes and prevailed. In its complaint First National inadvertently alleged that it was a "Nebraska Banking Corporation", organized under the

laws of Nebraska, when in fact it is a National Banking Association organized under laws enacted by the U.S. Congress.

Grasping upon that mistake, the petitioners brought a tort action in federal court against First National, the United States and several federal agencies, making numerous claims, most arising from that mistake. *See, Hagebush v. United States,* 657 F.Supp. 675 (D.Neb. 1986). The court dismissed the claims against the United States and the named federal agencies because they were exempt under the Federal Tort Claim Act and then dismissed the claims against First National for lack of diversity and failure to state a claim.

After the dismissal of their federal court case, the petitioners instigated this action in state court. Petitioners sought a writ of mandamus against respondent, Governor Orr, and the Nebraska State Bar Association. In the Petition for the Writ of Mandamus, the petitioners requested that the court order Governor Orr to: (1) close First National for being in violation of Nebraska banking laws; (2) force First National to supply petitioners with certain documents (First National's Nebraska Corporation Registration); and (3) pay $15,000,000 in damages. Petitioners also sought an order from the court requiring that the Nebraska State Bar Association: (1) discipline First National's attorneys for filing false documents in courts, (2) provide certain documents to petitioners; (3) have all of the Nebraska State Bar Association members' licenses declared invalid; (4) have all attorneys of record surrender their licenses to the Sheriff of the county in which they reside, and (5) pay $596,987,000 in damages. Both defendants demurred to the writ and the District

Court of Lancaster County sustained the demurrers and dismissed the action with prejudice.

The petitioners then appealed the dismissal to the Supreme Court of Nebraska. Following the recommendation of the pretrial conference officer, the Supreme Court of Nebraska summarily affirmed the lower court's dismissal pursuant to Neb.Ct.R. of Prac. 7A(4) (Revised 1986) which states:

> 7A. Summary disposition of any case by the Supreme Court on the court's motion (parties may not request disposition under this section of this rule).
>
> When the court determines that...
>
> (4) No error of law appears; and the court also determines that a detailed opinion would have no precedential value, the judgment or order will be affirmed in the following manner: AFFIRMED. See Rule 7A.

The petitioners then filed a petition for writ of certiorari with this court. It should be noted that in the writ, petitioners named Governor Orr, the Nebraska State Bar Association and First National as respondents. However, First National was not a party to that action below. Possibly, petitioners are attempting to include in this petition for writ of certiorari, claims from either their loss in *First Nat. Bank of Omaha v. Hagebush* (Case No. 85-561, Pet.App.1), 225 Neb. 711, 407 N.W.2d 787 (1987), or the dismissal of *Hagebush v. First Nat. Bank of Omaha et al.*, Docketed as CV85-O-96 (Dist. of Neb.) which was affirmed by the Eighth Circuit Court of Appeals (Case No. 85-1726, Pet.App.5) in an unpublished decision on September 9, 1985.

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REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the questions presented in the petition.

The only question which was decided by the Supreme Court of Nebraska and therefore the only question that can be properly raised in the Petition for Writ of Certiorari is whether or not the Supreme Court of Nebraska properly affirmed the order of the District Court of Lancaster County, Nebraska, dismissing the action below. In *Tyrrell v. District of Columbia,* 243 U.S. 1 (1917) this court stated, "When . . . we discover that the question upon which the certiorari was prayed under the circumstances previously stated does not arise on the record [it] is not open for consideration, and therefore the Petition for Certiorari [is] rested upon a wholly unsubstantial and nonexisting ground." *Id.* at 243.

This court in *Tyrrell* dismissed the writ because petitioner did not make an exception in the lower court to the question it raised in their Writ of Certiorari and therefore it did not properly arise in the record and could not be considered. In the case at bar, however, due to the lower court's sustaining of defendant's demurrers, there is absolutely nothing in the record which speaks to the questions as presented by the petitioners. Thus, the petition must fail because it is "rested upon wholly unsubstantial and nonexisting grounds."

Furthermore, in a line of cases, this court has held that normally when there is no lower court opinion on the legal issue(s) raised in the petition it will decline to consider the claim. *National Labor Relations Board v. Sears, Roe-*

buck & Co., 421 U.S. 132, 164, 95 S.Ct. 1504, 1523, 44 L.Ed. 2d 29, 55 (1975); *Ramsey v. Mine Workers*, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Since the lower court dismissed on demurrer and the Nebraska Supreme Court affirmed pursuant to Neb.Ct.R. of Prac. 7A(4) (Revised 1986), there exists no opinion on anything, let alone the questions asserted by the petitioners. While it is not contended that a State Supreme Court can escape this court's review by merely refusing to write an opinion, the lack of opinion does tend to establish the frivolousness of petitioners' claims and that the only question capable of properly being before this court, is the one presented in this response brief.

2. There is no federal question before this court sufficient to invoke its jurisdiction.

This court has held that in order for it to invoke jurisdiction under Sup.Ct.R. 17, "There must be a real substantive question on which the case may be made to turn, that is, a real, and not merely a formal, federal question is *essential* to the jurisdiction of this court." *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311, 23 S.Ct. 123, 124, 47 L.Ed. 190, 192 (1902) (emphasis added). However, if as stated earlier, the only question that can be presented to this court is whether or not the affirmation of the dismissal was proper, then there is clearly no federal question presentable to this court. The question as stated is solely a question of state court pleading and practice and therefore it is not sufficient to invoke the jurisdiction of this court.

Furthermore, in *Bowe v. Scott*, 233 U.S. 658 (1914) this court stated:

> [I]t is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition for rehearing, considers and passes upon the Federal ground therein relied upon, we dismiss that subject from view and come to consider whether the record otherwise discloses that a Federal question was so raised below as to support our jurisdiction.
>
> *Id.* at 233 U.S. 663, 34 S.Ct. 771, 58 L.Ed. 1144.

Just as the court in *Bowe* did not pass upon the federal grounds alleged in the petition for rehearing, the Supreme Court of Nebraska, due to the sustaining of the demurrers, did not have the opportunity to rule upon any federal question.

3. Even if the questions presented in the petition were proper they still do not raise a federal question sufficient for this court to invoke its jurisdiction.

This action, in neither form nor substance, was an action under federal law or the Constitution of the United States. Even though in their petition for writ of certiorari, petitioners allude to a due process violation, this is the first time they have ever mentioned such a claim. This court has stated, "[T]he jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right." *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655 (1897). However, upon reading the petition for writ of certiorari, it is difficult, if not impossible, to

ascertain how exactly petitioners' right to due process or any other constitutional right was allegedly violated. The action below was a proceeding in mandamus merely alleging that Governor Orr and the Nebraska State Bar Association failed to act against First National or the attorneys who made the inadvertent allegation; it did not involve any claims of a constitutional nature. This court, therefore, does not have jurisdiction to review the decision below.

4. Respondent, Governor Orr, has no authority over First National, thus the writ of mandamus was properly dismissed.

Aside from the impropriety of the questions as presented and the lack of jurisdiction, it is evident upon the facts that the dismissal was proper. In general, mandamus requires the establishment of three elements: (1) plaintiff has a clear right to the relief sought; (2) the defendant has a clear duty to do the act in question, and (3) no other adequate remedy is available. Neb.Rev.Stat. §§ 25-2156 to 25-2159 (Reissue 1985); *Archbishop Bergan Mercy Hosp. v. Heckler,* 614 F.Supp. 1271, 1275 (D.Neb. 1985); *Jeno's, Inc. v. Commissioner of Patents and Trademarks,* 498 F.Supp. 472, 476 (D.Minn. 1980); *Yaar v. Resor,* 339 F.Supp. 964, 967 (E.D.N.C. 1972). However, not only is there no "clear duty" in this case, there is no duty whatsoever. First National was chartered as a national banking association in 1863 and as such is under the control of the comptroller of currency. Its status as a national bank has continued uninterrupted since that time (Pet.App.12). In regard to national banks this court has stated:

> National banks are brought into existence under federal legislation, are instrumentalities of the federal government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a state in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States.

First National Bank v. Missouri, 263 U.S. 640, 656, 44 S.Ct. 213, 215, 68 L.Ed. 486, 492 (1923).

Certainly allowing respondent, Governor Orr, the authority to close a national bank would "interfere" with its purpose, "impair or destroy" its "efficiency", and "conflict with the paramount law of the United States."

The Governor clearly does not have the authority, let alone the duty, to close First National. Furthermore, it is the respondent's opinion that the plaintiff does not have a "clear right" to the relief sought and there may exist a more adequate remedy than mandamus. However, in order to remain brief and because the mandamus action fails for a lack of duty, the issues of clear right and adequate remedy will not be discussed.

———o———

CONCLUSION

Because the writ of mandamus was originally dismissed on demurrer, there is no evidence in the record which speaks to the questions as presented by the petitioner and therefore they are not properly before this court. The only question which could be properly raised from the

record is whether or not the affirmation of the dismissal was proper. That question, however, is merely a question of state pleading and practice and, is not sufficient to invoke the jurisdiction of this court. Furthermore, even if the questions as presented by the petitioners were proper, they fail to raise a sufficient federal question necessary for this court to invoke its jurisdiction. Finally, it is apparent from the facts that the original action in mandamus was properly dismissed because the respondent, Governor Orr, clearly has no duty to perform the acts requested. For these reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

KAY ORR, Governor,
State of Nebraska, Respondent

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APPENDIX

BEFORE THE SUPREME COURT OF NEBRASKA

Water Conservation Systems Co.,	)	
	)	No. 87-337.
Appellant,	)	
	)	ORDER
v.	)	
	)	(Filed June 19,
Nebraska State Bar Association and Kay Orr, Governor,	)	1987)
	)	
	)	
Appellees.	)	

This matter came on for consideration this 17th day of June 1987, upon the Court's own motion.

Our review reveals that there exists no error of law and that a detailed opinion would have no precedential value.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the district court's judgment of dismissal be, and the same hereby is, affirmed pursuant to the provisions of Neb. Ct. R. of Prac. 7A(rev. 1986).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the motions of the defendants, Nebraska State Bar Association and Kay Orr, Governor, for dismissal pursuant to Neb. Ct. R. of Prac. 7B(2) (rev. 1986), and the motion filed by plaintiff on June 12, 1987, seeking a determination of whether counsel appearing for said defendants could properly appear, each be, and each hereby is, overruled as moot.

BY THE COURT

/s/ Leslie Boslaugh
Chief Justice Pro Tempore